# Governance News

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# Diversity

## Gender Diversity on ASX 200 boards has stalled according to the latest AICD report and it's not for lack of board ready female candidates

**Report Overview | Australian Institute of Company Directors (AICD), Tracking 30% target Gender Diversity Progress Report April to June 2019**

**Key Findings**

- As at the end of June 2019, women accounted for 29.7% of ASX 200 directors — unchanged from the December 2018 result
- As at the end of June 2019:
  - 90 ASX 200 companies had reached the 30% female board representation target
  - 48 ASX 200 companies had only one female board member
  - 4 ASX 200 companies had zero women directors
  - 13 ASX 200 companies have a female Chair
  - 9 ASX 200 companies have female managing director and CEOs
- By comparison, 31.5% of board members in ASX 100 companies are women, rising to 32.7% in the ASX 50 and 34.4% in the ASX 20

Commenting on the findings AICD CEO and Managing Director Angus Armour said it was disappointing to see that the percentage had not increased since the end of December 2018.

'While gender diversity on boards is not sliding backwards, it is a concern that progress is stalling…Boards struggling with gender diversity should ask themselves if their search processes are effective and competitive enough to access the large talent pool of female directors in Australia' Mr Armour said.

Mr Armour added that the AICD will continue to advocate strongly on gender diversity, for example through its Chair Mentoring Program. He observe that 'we have promoted a pipeline of board ready women. These women are extremely qualified and ready for ASX 200 board appointments. Ensuring these women are visible and connected to Executive Search Consultants, ASX Chairs and NEDs is one of the main objectives of the program'.

*[Sources: AICD media release 25/07/2019; AICD report: Tracking 30% target Gender Diversity Progress Report April to June 2019]*

## Zero all-male boards: Bloomberg reports that for the first time, all S&P 500 companies have at least one female director

Bloomberg reports that the last organisation with an all-male board in the S&P 500 (Copart Inc) has added a female director, CyrusOne CFO Diane Morefield.

For context, in 2000, about 86% of S&P 500 companies had at least one women on their board, so it has taken 20 years for the 14% of companies to close the gap. Bloomberg attributes progress on the issue to pressure from activist investors, and more recently institutional investors as well as to the influence of Californian legislation mandating quotas for companies headquartered in that state.

*[Sources: Bloomberg 25/07/2019]*

## Remuneration

**Do APRA's proposed remuneration reforms go far enough? Professor Elizabeth Sheedy suggests a moratorium on bonuses in the financial services sector until a better approach than the flawed 'balanced scorecard' system is identified**

Writing in response to the Australian Prudential Regulation Authority's discussion paper and draft prudential standard setting out its proposed new and more prescriptive approach to remuneration, Professor Elizabeth Sheedy (Macquarie School of Business at Macquarie University) suggests that though the emphasis on an expanded oversight role for boards is welcome, APRA's recommendations could have gone further.

**Some Key Points**

- **APRA's acceptance of the balanced scorecard is 'disappointing':** Professor Sheedy expresses disappointment at the regulator's acceptance of the 'balanced scorecard' approach give that 'there is still no good evidence that it works. And the experimental research Macquarie University conducted in 2018 among finance professionals shows that it doesn't work'.

- **Research shows that the approach 'doesn't work':** Professor Sheedy writes that a 2018 study (supported by Deloitte Australia, the Insurance Council of Australia, Australia and New Zealand Institute of Insurance and Finance and the Financial Services Institute of Australasia) found that under a balanced scorecard arrangement: a) finance professionals were significantly more likely to exhibit misconduct relative to the case of fixed remuneration; and b) such remuneration schemes are damaging to organisational culture, creating an environment where the behavioural norms are more tolerant of bad behaviour.

[Note: The study referred to appears to be: Behaviour of Finance Professionals under the Balanced Scorecard, released last year. For a summary see: Governance News 26/11/2019. The Financial Services Royal Commission's Final Report also raises concerns about the way in which 'balanced scorecards' have been implemented to date and suggests that 'careful attention' needs to be given to the way in which balanced scorecards are structured going forward in order to incentivise good behaviour. See: Financial Services Royal Commission Final Report, Volume 1 at p370-374]

- **The balanced scorecard approach proceeds from a flawed premise?** 'The problem with the balanced scorecard is fundamental in my view. It suggests that the interests of customers and shareholders can be balanced or traded off in some way. A certain amount of mistreatment of customers is tolerable, provided you are bringing home the bacon for shareholders' Professor Sheedy writes. Professor Sheedy questions whether shareholders should be demanding that 'no mistreatment of customers is acceptable' on the basis that strong financial performance 'should be seen as worthless if it is achieved through unethical means'.

- **Measurement problems doom the balanced scorecard to failure?** Though financial performance is relatively straight forward to measure, non-financial criteria such as customer outcomes are 'almost impossible to measure with accuracy in the short term' Professor Sheedy writes. Neither the Net Promoter Score (which measures customer satisfaction shortly after the purchase decision) or complaints data are without issues in her view, especially in the context of financial services context. In addition, when implemented in a financial situation, the balanced scorecard approach typically includes criteria that are judged subjectively by managers which is problematic. 'Due to the large amount of managerial discretion in the ratings, and the desire to retain top performers in sales/profits, it is likely that managers may give a high rating to such staff despite poor behaviour. Even more worrying, subjective performance ratings can be prone to favouritism, collusion and extortion' Professor Sheedy writes.

- **APRA's capability in this area is weak:** Professor Sheedy also makes the point that the 'effective operation of this system relies on good oversight from APRA' which the recent APRA Capability Review found was weak in this area.

- **Regulatory capture?** In light of the issues inherent in the 'balanced scorecard approach' Professor Sheedy queries 'Is APRA's implicit endorsement of the balanced scorecard, the industry's preferred remuneration method, another case of regulatory capture?'

**Why is it that financial services employees have to be paid bonuses? There should be a moratorium until a better way forward is found**

'Millions of Australians will be wondering why it is that financial services employees have to be paid any bonuses at all. After all, most of us go to work every day and do a good job because it's the right thing to do, not because they might receive a bonus' Professor Sheedy writes. Further, she suggests that bonuses in the financial services sector may be 'attracting exactly the wrong kind of person into the sector — people who are ultimately self-interested'.

On this basis, she argues that 'a moratorium should be placed on staff variable remuneration — normally paid as a cash bonus — until someone can come up with a way of making it work'.

*[Sources: [registration required] The Australian 25/07/2019]*

### In Brief | A US study examining the correlation between use of executive pay consultants and CEO pay has confirmed that firms using consultants pay their CEOs more and that the 'CEO pay premium' is largely explained by the composition and complexity of CEO pay

*[Sources: Harvard Law School Forum on Corporate Governance and Financial Regulation 29/07/2019; [registration required] Murphy, Kevin J. and Sandino, Tatiana, Compensation Consultants and the Level, Composition and Complexity of CEO Pay (August 28, 2017). Accepted and forthcoming at The Accounting Review. Available at SSRN: https://ssrn.com/abstract=3041427 or http://dx.doi.org/10.2139/ssrn.3041427]*

## Other Shareholder News

### Renewed investor interest in the issue of director 'overboarding': ISS has released a whitepaper analysing emerging trends in investor sentiment

**Report Overview | ISS Whitepaper: Director Overboarding: Global Trends, Definitions, and Impact**

Institutional Shareholder Services (ISS) has released a whitepaper analysing emerging trends in investor sentiment with respect to the issue of director 'overboarding', an issue that ISS says has been a key consideration for many investors for a number of years, and which took 'centre stage' in the 2019 proxy season with a number of directors receiving lower levels of shareholder support than previously.

**What is investors' key concern?** The main concern for investors and companies is the ability of directors to fulfil their responsibilities given the significant time commitment associated with each directorship.

**Renewed investor interest in the issue:** ISS attributes increased levels of investor concern around the issue to: a) the increased time commitment required to meet expanding board responsibilities; b) moves by asset owners and asset managers to dedicate more resources to monitoring corporate governance risks/focus on board quality (of which overboarding is one aspect eg through stricter 'overboarding' policies); and c) increased transparency and availability of information with respect to board roles and responsibilities.

**Some Key Points**

- **Expectations are shifting:** ISS found that market norms and expectations with respect to the maximum number of boards on which a director should serve are evolving. Since the global financial crisis, increased investor scrutiny on board performance appears to have led to a decrease in the number of boards on which directors are typically serving. In the US, the percentage of non-CEO directors who sit on five or more boards has decreased by half since 2008 from 3.2% to 1.6%
- **A maximum of four boards is emerging as the new standard?** Where until recently five or six directorships were considered acceptable by most investors, over the last two years there has been a shift towards a new standard of no more than four public boards (though this varies by location). ISS observes that there is no single standard definition of an 'overboarded director' and that the proportion of directors who serve on multiple boards differs by country. In markets where multiple directorships are more common (eg India, Hong Kong) initial regulatory efforts to curb the number of directorships set the limit to six or seven directorships. In developed markets, investors tend to expect a maximum of four or five mandates, with four boards gaining traction as the new limit among many companies and investors.
- **For CEOs, 'three is the new four'?** ISS found that the level of opposition against CEOs serving on three boards (32%) is similar to the level of opposition against CEOs serving on four or more boards (36%) suggesting 'the emergence of another new standard for overboarding'.

- **A growing number of public companies appear to be taking steps to address overboarding,** often by placing limitations on the number of outside boards that a CEO and directors may serve on, and even putting additional limits on audit committee members as well. Over time, ISS expects more companies, including large-cap companies and eventually more smaller firms, to adopt similar measures to ensure that adequate time is available for directors to fulfil their director responsibilities.
- **ISS observed that companies with overboarded directors performed worse than companies with no overboarded directors**
- **Predictions for the future?** As more investors continue to adopt stricter policy criteria on 'overboarding', ISS anticipates that pressure on over-extended directors will rise

*[Source: [registration required] ISS Whitepaper: Director Overboarding: Global Trends, Definitions, and Impact 19/07/2019]*

**In Brief | A pause in listings of active exchange traded funds? The AFR reports that ASIC has requested that market participants 'cease admitting any non-transparent investment products with internal market makers for the time being' to enable the regulator to consider appropriate regulatory settings. An ASIC spokesman reportedly confirmed the notice and said the regulator was undertaking a review during the remainder of 2019. The ASX has reportedly supported ASIC's approach**

*[Source: [registration required] The AFR 29/07/2019]*

## Financial Services

### Top Story | Implementation of FSRC recommendation 4.7: Consultation on the extension of UCT provisions to insurance contracts

**Overview | Exposure Draft, Treasury Laws Amendment (Unfair Terms in Insurance Contracts) Bill 2019**

**Key Takeouts**

- **Context:** The proposed changes implement the government's response to Financial Services Royal Commission Recommendation 4.7, and are also in line with the recommendations of various inquiries. The draft legislation has been released following the release of a discussion paper outlining a proposed model last year
- **Application:** The draft Bill proposes to enable the UCT regime to apply to insurance contracts covered by the Insurance Contracts Act where at least one party to the contract is a consumer or a small business and the contract is a standard form contract. The draft Bill also proposes tailor the existing UCT regime in its application to insurance contracts
- **Timeline:** The deadline for submissions is 28 August 2019. The proposed commencement date for the amendments is 18 months after the Bill receives Royal Assent. The UCT regime will apply to insurance contracts made or varied after the commencement date

The government is consulting on draft legislation which proposes to extend the application of the unfair contract terms regime (UCT regime) to insurance contracts in line with Recommendation 4.7 of the Financial Services Royal Commission Final Report. The government announced that it would extend the UCT regime to insurance contracts on 4 February as part of its response to the Commission's recommendations.

In announcing the consultation, Treasurer Josh Frydenberg said that 'removing the exemption for insurance contracts from the UCT regime will ensure consumers and small businesses have the same protections regardless of which financial service or product they are purchasing.' Mr Frydenberg added that the government is taking action on all 76 recommendations made by the Financial Services Royal Commission.

The deadline for submissions is 28 August 2019.

**Context**

**Implementing FSRC recommendations 4.7, 7.3 and 7.4**

- Although the UCT protections apply to most financial products and services regulated by the Australian Securities and Investments Commission Act 2001 (ASIC Act), they do not currently apply to insurance contracts regulated under the Insurance Contracts Act 1984 (Insurance Contracts Act). The draft Bill proposes to extend the UCT regime to insurance contracts in line with Financial Services Royal Commission Recommendation 4.7.
- The government has also agreed that wherever possible, it will simplify the financial services law to eliminate exceptions and qualifications to the law (Financial Services Royal Commission Recommendation 7.3). The draft Bill removes one such exemption.
- The government has further agreed to identify the norms of behaviour and principles that underpin legislation as part of the legislative simplification process (Financial Services Royal Commission Recommendation 7.4). The norm underlying this Bill is that insurers should not include terms in their standard form contracts that are unfair to the other party.

**Proposed change is also in alignment with the recommendations of a number of other inquiries:** The explanatory memorandum accompanying the draft legislation notes that a range of government and independent inquiries since 2010 have recommended the extension of UCT provisions to insurance contracts.

**The release of the draft legislation follows earlier consultation on a proposed model:** The government has previously released a proposals paper outlining a potential model for extending the regime (for a summary of the proposed model see: Governance News 02/07/2018).

**Some Key Points**

There are two key components in the draft Bill. These are as follows.

**1. Extension of the UCT regime to insurance contracts:** The draft Bill proposes to amend the Insurance Contracts Act 1984 (Cth) to enable the UCT regime under the Australian Securities and Investments Commission (ASIC) Act 2001 (Cth) to apply to insurance contracts covered by the Insurance Contracts Act where: a) at least one party to the contract is a consumer (as defined in subsection 12BF(3) of the ASIC Act) or a small business (as defined in subsection 12BF(4) of the ASIC Act); and b) the contract is a standard form contract (as defined in section 12BK of the ASIC Act).

2. **The draft Bill proposes to amend the ASIC Act to tailor the existing UCT regime in its application to insurance contracts.**

[Note: In recommending the UCT protections be extended to insurance contracts, Commissioner Hayne also recommended that 'The provisions should be amended to provide a definition of the 'main subject matter' of an insurance contract as the terms of the contract that describe what is being insured. The duty of utmost good faith contained in section 13 of the Insurance Contracts Act should operate independently of the unfair contract terms provisions'. See: Financial Services Royal Commission Final Report Volume 1, recommendation 4.7 at p308]

- **Main subject matter:** The ASIC Act presently excludes terms that define the main subject matter of a contract from the UCT regime. The draft Bill proposes to amend the ASIC Act to provide that the main subject matter of an insurance contract is limited to the description of what is being insured eg the house, car or person that is insured. The draft explanatory memorandum comments that the Financial Services Royal Commission considered that the benefits of extending the UCT regime to insurance contracts would be undermined if a broader definition of main subject matter were adopted.
- **Transparent excess terms:** The draft Bill proposes to amend the ASIC Act to exclude terms that set the quantum or existence of the excess or deductible in an insurance contract from the UCT regime, as long as they are presented transparently.
- **Third party beneficiary:** The draft Bill proposes to amend the ASIC Act to allow for third party beneficiaries of insurance contracts to bring actions against insurers under the UCT regime.

**Duty of utmost good faith**

Under the Insurance Contracts Act parties to insurance contracts have an obligation to act with the utmost good faith (sections 12-15 of the Insurance Contracts Act). The draft Bill does not propose to impact this obligation, with the duty of the utmost good faith operating independently of the UCT regime (in line with Recommendation 4.7 of the Financial Services Royal Commission).

The explanatory memorandum states that, 'A breach of the duty of the utmost good faith will not necessarily equate to a breach of the UCT regime. A breach of the UCT regime will not necessarily equate to a breach of the duty of the utmost good faith. Each regime operates independently of the other. However it is possible that some scenarios may give rise to relief under both sets of provisions. In such scenarios, a party may bring actions before the court under either or both regimes, and the court will be able to take into account the concurrent operation of the two regimes when considering what orders to make'.

**When would a term be considered unfair?**

If an insurance contract is subject to the UCT regime, a term in that insurance contract may be declared unfair and therefore void. A term is considered unfair if it meets all three criteria in section 12BG of the ASIC Act which currently apply to general contracts.

As such, a term would be unfair if it: a) would cause a significant imbalance in the parties' rights and obligations arising under the contract; and b) is not reasonably necessary in order to protect the legitimate interests of the party that would be advantaged by the term; and c) would cause detriment to a party if it were to be applied or relied on. Section 12BH sets out examples of terms which could be unfair. Diagram 1.1 at p 7 of the Explanatory Memorandum accompanying the draft Bill summarises the operation of the proposed changes.

**Proposed timeline and application**

- Consultation closes on 28 August 2019
- The proposed commencement date for the amendments is 18 months after the Bill receives Royal Assent.
- The UCT regime will apply to insurance contracts made or varied after the commencement date.

**Cost of implementation?**

The explanatory memorandum states that the compliance costs for insurers are likely to be 'low'. It's estimated that there will be upfront costs of $4m in the first year to implement the reform with zero ongoing costs for insurers.

*[Sources: Treasurer Josh Frydenberg media release 30/07/2019; Treasury media release 30/07/2019; Exposure draft legislation: Treasury Laws Amendment (Unfair Terms in Insurance Contracts) Bill 2019; Explanatory Memorandum; [registration required] The AFR 30/07/2019]*

## The government intends to introduce legislation to implement Financial Services Royal Commission Recommendation 2.4: Grandfathered Commissions

Treasurer Josh Frydenberg and Assistant minister for superannuation, financial services and financial technology Jane Hume jointly released a statement on 30 July announcing the government's intention to introduce legislation — The Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Bill 2019 — to implement the government's response to Financial Services Royal Commission recommendation 2.4, the ban on the grandfathering of conflicted remuneration paid to financial advisers by 1 January 2021.

[Note: On 22 February 2019, the Government released the Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Bill 2019 for consultation. Consultation concluded on 22 March. Reportedly, a number of submissions to the consultation raised concerns. A further consultation on draft regulations was conducted in April. See: Governance News 27/02/2019; 01/05/2019; 05/04/2019. At the time of writing, the Bill has not yet been introduced.]

Mr Frydenberg said that the changes will 'benefit retail clients, as they will receive higher quality advice and stop paying higher fees to fund grandfathered conflicted remuneration. Commissioner Hayne made it very clear in the Royal Commission Final Report that this grandfathering shouldn't continue'.

Mr Frydenberg added that the legislation will also include a power to make regulations to establish a scheme that will provide that those people paying conflicted remuneration rebate clients for any remuneration that would be paid after 1 January 2021.

In addition, Mr Frydenberg said that the government has commissioned the Australian Securities and Investments Commission (ASIC) to monitor and report on the extent to which product issuers are acting to end the grandfathering of conflicted remuneration, with a view to ensuring that the benefits of industry renegotiating current arrangements to remove grandfathered conflicted remuneration ahead of 1 January 2021 flow through to clients.

Mr Frydenberg reiterated the government's commitment to action all 76 recommendation in the Financial Services Royal Commission's final report.

*[Sources: Treasurer Josh Frydenberg media release 30/07/2019;*

## ASFA report raises concerns that many Australians are retiring with insufficient superannuation to fund a comfortable retirement

The Association of Superannuation Funds of Australia (ASFA) has released a report entitled Better Retirement Outcomes: a snapshot of account balances in Australia. The report found that many people are retiring with a superannuation balance well below the ASFA comfortable retirement standard of $545,000.

**Some Key Findings**

- **Most people retiring in the next few years will rely partially or substantially on the Age Pension as they have inadequate super savings:** The median account balance for the 60-64 age group is well below the ASFA comfortable retirement standard for a single person of $545,000. For men, the median account balance is $154,453 and for women it's $122,848
- **Almost a quarter of women in the 60-64 age group will retire with zero superannuation savings:** Though 16.1 million people have at least one superannuation account, across all age groups, a quarter of men and a third of women have zero superannuation savings. In the 60-64 age group, 23% of women and 13% of men have zero superannuation savings
- **Women still lag 'substantially' when it comes to average account balances**, although the gender gap is closing
- **Additional contributions required:** Many people, especially those who will not receive the full benefit of the Super Guarantee (increasing to 12% by 2025) over their entire work life, still need to contribute over and above compulsory contributions to ensure they have adequate retirement savings
- **The proportion of new retirees who are fully self-funded has been increasing**. Based on current trends, ASFA predicts that 43% of people will be self-funded at retirement age by 2023 (compared with 22% in 2000)
- **Another thirty years to see the 'full benefit':** ASFA anticipates that more Australians will achieve a self-reliant retirement in the future as the superannuation system matures and more Australians have lived with the Superannuation Guarantee in place – particularly once it has increased to 12%. However, according to the report it will be another 30 years or so before most individuals will have the full benefit of a mature superannuation guarantee system. Even then, a minority of retirees will have no superannuation at all. This includes: those who have had little or no paid labour force experience since 1992 (such as individuals well into their nineties); those who have been self-employed and have not made voluntary contributions, or those who have cashed out their super benefit.

*[Source: Better Retirement Outcomes: a snapshot of account balances in Australia]*

## Inquiry into the Big Four banks to be broadened to include the ABA, superannuation funds and insurers

The Australian Banking Association (ABA) has said that Treasurer Josh Frydenberg has requested the House Economics Committee to broaden its scope beyond inquiring into the Four Major Banks to also include industry associations, including the Australian Banking Association, as well as CEOs of superannuation funds and insurers.

The organisations appearing will reportedly be required to provide progress updates on implementation of the Financial Services Royal Commission recommendations.

*[Source: ABA July Newsletter 26/07/2019]*

## Alleged breach of requirement to provide financial services efficiently, honestly and fairly: ASIC has commenced civil penalty proceedings against ANZ

The Australian Securities and Investments Commission (ASIC) issued a statement confirming that it has commenced proceedings in the Federal Court against Australia and New Zealand Banking Group Limited (ANZ) in connection with certain periodic payment fees charged by the lender over the period 26 July 2013 to 23 February 2016.

**Some Key Points**

- ASIC alleges that ANZ was not entitled, under its contract with customers, to charge certain fees (fees for switching funds between accounts where the accounts in question were in the name of the same person/business).
- ASIC alleges that between 26 July 2013 and 23 February 2016, ANZ unlawfully charged the fees on at least 1,340,087 occasions.
- ASIC contends that ANZ first became aware there was a risk the bank was not entitled to charge these fees in July 2011 but (allegedly) did not take appropriate steps to address the situation.
- ASIC alleges ANZ breached section 912A(1)(a) and (c) the Corporations Act 2001 (Corporations Act) which requires a licensee to ensure that the financial services covered by its licence are provided efficiently, honestly and fairly and to comply with financial services laws because it amongst other things, provided incomplete or misleading information when it reported the issue to ASIC in February 2014.
- ASIC further alleges breaches by ANZ of the Australian Securities and Investments Commission Act 2001 (ASIC Act), including that ANZ engaged in misleading or deceptive conduct, made false or misleading representations and engaged in unconscionable conduct because the bank: a) continued to charge the fees when it knew that the fees were unlawful or were at risk of being unlawful; b) knew that it was highly unlikely that it would be able to remediate all affected customers; c) failed to inform customers who may have been affected by its unlawful charging until September 2015; and d) deliberately did not make remediation payments to customers who had been charged the fees between August 2003 to 31 December 2007.
- According to ASIC's statement, the (alleged) ASIC Act contraventions attract a maximum pecuniary penalty of between $1.7 million and $2.1 million per contravention.
- ASIC estimates that the total gross loss to customers during the period 1 January 2008 to 23 February 2016 is in excess of $50 million. ANZ has paid approximately $28 million in remediation to customers to date. However, ANZ has not paid remediation to customers who have been charged the fees prior to 31 December 2007.

**ANZ response:** In a statement ANZ said that 'while ANZ is still considering the matters raised by ASIC, ANZ categorically denies any deliberate wrongdoing and intends to vigorously defend any such allegation'.

**Background:** ASIC says that ANZ first reported the matter to ASIC in February 2014. ANZ further advised ASIC in September 2018 that that information previously provided to ASIC relating to ANZ's identification of the issue was incomplete. As a result of the new information, ASIC commenced an investigation into ANZ in October 2018.

*[Sources: ANZ media release 25/07/2019; ASIC media release 25/07/2019; Investor Daily 25/07/2019; [registration required] The AFR 25/07/2019]*

## ASIC has banned a financial adviser (who was the subject of a case study the Financial Services Royal Commission) from providing financial services for a period of three years

ASIC has banned a Sydney-based financial adviser Sam Maxwell Henderson for three years following an investigation into his conduct. Mr Henderson was an authorised representative, responsible manager, director and Chief Executive of Australian financial services (AFS) licensee Henderson Maxwell Pty Ltd (Henderson Maxwell).

[Note: One of the case studies in the second round of the Financial Services Royal Commission's hearings concerned financial advice under the AFSL of Henderson Maxwell Pty Ltd. In his final report, Commissioner

Kenneth Hayne said that the case studies considered (including the Henderson Maxwell case study) served to illustrate the issues arising from existing disciplinary arrangements for financial advisers. See: Financial Services Royal Commission Final Report, vol 1 at p197-199]

ASIC found that Mr Henderson: a) failed to act in the best interests of his clients, provide appropriate advice and to prioritise his clients' interests when providing personal financial advice which led to clients losing money/being at risk of losing money; b) did not properly document or investigate his clients' existing products; c) failed to provide advice that was relevant to their specific goals; c) recommended the use of in-house Henderson Maxwell products without providing product comparisons or justifying why the in-house products were better than his clients' existing products; and d) was involved in Henderson Maxwell breaching its obligation as an Australian Financial Services (AFS) licensee to disclose information about relationships or associations that could influence the financial advice provided.

ASIC said that Mr Henderson's banning will be recorded on ASIC's publicly available Financial Advisers Register and Banned and Disqualified Register. ASIC added that its investigation into Mr Henderson's conduct is continuing, though Mr Henderson retired from the financial planning industry in June 2018,

Mr Henderson has the right to appeal to the Administrative Appeals Tribunal for a review of ASIC's decision.

*[Source: ASIC media release 24/07/2019]*

## An under-representation in the younger age categories (particularly the 20-29 age category): The Australian Prudential Regulation Authority (APRA) has released its Private Health Insurance Annual Coverage Survey for 2018

The Australian Prudential Regulation Authority (ARPA) has released its Private Health Insurance Annual Coverage Survey for 2018. The survey report provides a snapshot at December each year of the number of people, by age, gender and state of residence, with hospital insurance.

**Some Key Points**

- There were generally decreases in hospital treatment membership across younger age groups and increases across older age groups in the year to December 2018.
  - The largest decline over 2018 was in the age group 25 to 29 (down 6.9%), while the largest increase was in the age group 90 to 94 (up 8.8%)
  - The 25 to 29 age group recorded the largest decline in insured persons over the year (down 33,975 people), while the 70 to 74 age group experienced the largest increase in insured persons (up 24,380 people)
- APRA says that the 'most noticeable aspect' of the age distribution is an under-representation in the younger age categories that is particularly marked in the 20 to 29 age category.
- The distribution of insured people over age groups is consistent over all the states and territories.
- There were decreases in hospital membership across all jurisdictions, resulting in a 0.6% decline nationally over the year.
  - Hospital coverage (insured persons as a share of population) fell across all jurisdictions, leading to the national coverage falling from 45.6% in December 2017 to 44.6% in December 2018.
  - WA reported the highest proportion of population with hospital insurance across all the States and Territories in the last two years, with 54.4% of its population having hospital treatment cover as at 31 December 2018.

*[Sources: APRA Privacy Health Insurance annual coverage survey 25/07/2019; [registration required] The AFR 25/07/2019]*

## No more closed doors? APRA has required Macquarie Bank Limited, Rabobank Australia Limited and HSBC Bank Australia Limited to tighten the intra-group funding arrangements for their Australian operations following a review of funding agreements across the authorised deposit-taking (ADI) industry

The Australian Prudential Regulation Authority (APRA) has required Macquarie Bank Limited, Rabobank Australia Limited and HSBC Bank Australia Limited to tighten the intra-group funding arrangements for their Australian operations following a review of funding agreements across the authorised deposit-taking (ADI) industry.

According to APRA's statement, its review found the lenders were improperly reporting the stability of the funding they received from other entities within their groups in breach of APS 210 Liquidity. More particularly, APRA found that they had provisions in their funding agreements that would potentially allow the group funding to be withdrawn in a stress scenario. This, APRA explains, has potential to undermine the stability of the Australian bank in each case.

APRA is requiring the banks to: a) strengthen intra-group agreements to ensure term funding cannot be withdrawn in a financial stress scenario; and b) to restate their past funding and liquidity ratios where these had been reported incorrectly, to provide transparency to investors and the broader community.

Further, APRA supervisors are considering a range of further options, including the imposition of higher funding and liquidity requirements.

To assist ADIs in complying with the prudential regulations, APRA has published a new frequently asked question (question 17), providing guidance on APRA's expectations with respect to reporting funding under APS 210.

Commenting on the announcement, APRA Deputy Chair John Lonsdale said that the lenders are 'financially sound, with strong liquidity and funding positions in the current stable environment. However, to ensure they would be able to withstand a scenario of financial stress, group funding agreements for Australian banks must be watertight, so they can be relied on when they would be most needed'.

**New transparency a sign of a shift in communication style?** Investor Daily comments that APRA's decision to name the banks involved is unusual and attributes it to the recent Capability Review which was critical of the regulator's behind closed doors approach.

*[Sources: APRA media release 24/07/2019; [registration required] The Australian 25/07/2019; Investor Daily 25/07/2019]*

## Treasury is consulting on remaking the existing Private Ancillary Fund Guidelines 2009 which are scheduled to sunset on 1 October

Treasury is consulting on remaking the existing Private Ancillary Fund Guidelines 2009 which are scheduled to sunset on 1 October. The draft Taxation Administration (Private Ancillary Fund) Guidelines 2019 are being made to ensure eligible funds may obtain or maintain deductible gift recipient status.

The draft guidelines do not alter the substantive meaning or operation of the existing guidelines. Minor technical changes have been made to reflect current drafting practice and omit provisions that are no longer operative. Transitional provisions are included in the draft guidelines to ensure continuity of operation between the sunsetting and the new guidelines.

The closing date for submission is 21 August 2019

*[Sources: Treasury consultation 25/07/2019; Exposure draft guidelines; Explanatory statement]*

## In Brief | Open Banking Bill progress update: Treasury Laws Amendment (Consumer Data Right) Bill 2018 has progressed to third reading stage in the House of Representatives

*[Source: Treasury Laws Amendment (Consumer Data Right) Bill 2018]*

**In Brief | ANZ has announced new risk weight floors will be applied to the NZ mortgage and farm lending portfolios for Level 2 reporting, following notification by APRA. The new risk weight floors would reduce the group's tier-1 capital ratio by 20 basis points**

*[Source: ANZ ASX Announcement 29/07/2019; [registration required] The Australian 30/07/2019]*

**In Brief | APRA has released an updated Implementation Plan for its new Data Collection Solution due to go live in 2020. The new solution will replace Direct to APRA (D2A)**

[Note: A summary of what is changing/what is not changing is available on the APRA website here: *https://www.apra.gov.au/1-what-new-data-collection-solution*]

*[Source: APRA media release 30/07/2019]*

**In Brief | ASIC is consulting on proposals to improve substantial holding disclosure by agents involved in securities lending (agent lenders). ASIC is proposing to replace [CO 11/272] with a legislative instrument that includes all the relief currently in [CO 11/272] in addition to proposed relief for agent lenders. This would be consistent with ASIC's policy in Regulatory Guide 222 Substantial holding disclosure: Securities lending and prime broking and the relief provided under Class Order [CO 11/272]. The deadline on submissions is 9 September 2019**

*[Sources: ASIC media release 29/07/2019; ASIC consultation paper: CP 319 Securities lending by agents and substantial holding disclosure; Draft instrument]*

## Accounting and Audit

**United Kingdom | The six largest UK audit firms must start regular reporting to the FRC by August on their policies/procedures/response to non-financial conduct matters**

The UK Financial Reporting Council (FRC) has written to the six largest audit firms outlining its expectations for reporting of non-financial conduct to the FRC as part of its Audit Firm Monitoring and Supervisions (AFMAS) responsibilities.

**Key Points**

- **Information request:** In order to 'build' on its 'current framework of interaction' with firms to understand and assess the design and effectiveness of the policies and procedures in place to facilitate the reporting of and response to nonfinancial conduct matters, the FRC has requested firms provide it with policies and procedures in relation to: a) internal whistleblowing; b) grievances; c) disciplinary matters and complaints from individuals outside the firms. The FRC states that the policies (etc) should include 'those which cover bullying and harassment, discrimination and alcohol/substance abuse and the material should include extracts from intranet pages that provide guidance to partners and staff where applicable and relevant extracts of Board reporting packs (if applicable). The information is requested by no later than 30 August 2019 and any issues in meeting this deadline should be communicated to the FRC as soon as practicable.

- **Quarterly reporting requirement:** The FRC is also seeking to establish a clear process for the regular reporting to the FRC of the level of non-financial conduct complaints and how those complaints are dealt with, on a quarterly basis starting from the quarter ending 30 September 2019. The first period for reporting is the quarter ended 30 September 2019, which, is requested by 11 October 2019.

- **Notification to the FRC of incidents which could pose a threat to the reputation of the firm:** The FRC expects firms to notify it of incidents which could pose a threat to the reputation of the firm, including incidents related to non-financial conduct. The determination of what matters are 'significant' in this regard will be subject to the firm's judgement.

- **Disclosure of any information reported will be limited:** 'We confirm that the information provided to the FRC will be treated as received in accordance with S1224A Companies Act 2006 and therefore subject to the prohibitions on onward disclosure and the limited exemptions' the FRC states. On this basis, 'We encourage a full and frank exchange of information between your firm and the FRC' the regulator states.

*[Source: FRC media release 24/07/2019]*

**In Brief | Simon Dingemans has been appointed as the new Chair of the UK Financial Reporting Council and will lead its transition to the new regulator the Audit, Reporting and Governance Authority (ARGA). He will take up the position in the 'autumn'**

*[Source: BEIS media release 23/07/2019]*

# Risk Management

## Cybersecurity, Technology and Privacy

### ACCC Digital Platforms Inquiry Final Report released: The government will consult and release its final detailed response at the end of the year

The Australian Competition and Consumer Commission's (ACCC) Digital Platforms Inquiry final report was publicly released on 26 July.

**Key Takeouts**

- The report makes 23 recommendations to address 'adverse effects' associated with digital platforms (primarily the largest, Facebook and Google) identified over the course of the inquiry
- Key recommendations include the following:
  - Recommendation 4 of the report recommends a special branch be established within the ACCC to proactively monitor and oversee digital platforms. The report states that this branch should be empowered by Ministerial direction to hold an extended public inquiry covering a period of at least five years and have the ability to compel relevant information.
  - Recommendation 5 recommends that the specialist branch be directed to hold an 18 month inquiry into competition for the supply of ad tech services and the supply of online advertising services by advertising and media agencies.
  - Recommendation 6 recommends a process to implement a 'harmonised media regulatory framework' ie the development of a new platform-neutral regulatory framework to ensure effective and consistent regulatory oversight of all entities involved in content production or delivery in Australia, including media businesses, publishers, broadcasters and digital platforms.
- In a statement, the Treasurer has said that the government accepts the 'ACCC's overriding conclusion that there is a need for reform — to better protect consumers, improve transparency, recognise power imbalances and ensure that substantial market power is not used to lessen competition in media and advertising services markets'. He added that 'The Government also accepts that there is a need to develop a harmonised media regulatory framework' (which appears to be a reference to recommendation 6).
- Next steps? The Treasurer said that the precise form of the reforms and a detailed government response to the report's recommendations will be informed by a 12 week public consultation process. Following these consultations, the Government intends to finalise its response to the report by the end of the year.

**Scope of the review:** In December 2017, the ACCC was directed by the government to inquire into the impact of digital search engines, social media platforms, and digital content aggregators on the state of competition in media and advertising services markets. The Inquiry formed part of a package of reforms to modernise and update Australia's media laws.

**Some Key Findings**

'Adverse effects' associated with digital platforms identified over the course of the inquiry include the following.

- The market power of Google and Facebook has distorted the ability of businesses to compete on their merits in advertising, media and a range of other markets

- The digital advertising markets are opaque with highly uncertain money flows, particularly for automated and programmatic advertising
- Consumers are not adequately informed about how their data is collected and used and have little control over the huge range of data collected
- News content creators are reliant on the dominant digital platforms, but face difficulties in monetising their content.
- Australian society, like others around the world, has been impacted by disinformation and a rising mistrust of news

**Recommendations**

The report makes 23 recommendations to respond to the substantial market power that has arisen through the growth of digital platforms, their impact on competition in media and advertising markets and implications for news media businesses, advertisers and consumers. The table below briefly summarises the recommendations.

[Note: A full list of recommendations is included at page 30 of the final report and can be accessed here.]

| | |
|---|---|
| **Continued scrutiny of digital platforms** | ▪ The establishment of a specialist digital platforms branch within the ACCC, with standing information-gathering powers, to proactively monitor and investigate potentially anti-competitive conduct by digital platforms and conduct that may breach our consumer laws, and to undertake rolling market studies. The report states that this branch should be empowered by Ministerial direction to hold an extended public inquiry covering a period of at least five years and have the ability to compel relevant information (recommendation 4)<br>▪ The specialist digital platforms branch (as proposed by Recommendation 4) be directed to hold an inquiry into competition for the supply of ad tech services and the supply of online advertising services by advertising and media agencies. The inquiry should be completed over a period of 18 months (recommendation 5) |
| **Supporting news media and access to news** | ▪ A new platform-neutral regulatory framework be developed and implemented to ensure effective and consistent regulatory oversight of all entities involved in content production or delivery in Australia, including media businesses, publishers, broadcasters and digital platforms. The ACCC recommends that this be approached in stages to ensure that regulatory disparities of immediate concern are promptly addressed (recommendation 6)<br>▪ Requiring designated digital platforms to each develop and implement a code of conduct to govern their relationships with news media businesses. The Australian Communications and Media Authority (ACMA) to administer the Codes. If a digital platform is unable to submit an acceptable code to the ACMA within nine months of designation, the ACMA should create a mandatory standard to apply to the designated digital platform (recommendation 7)<br>▪ Introducing a mandatory take-down ACMA code to assist copyright enforcement on digital platforms (recommendation 8)<br>▪ Stable and adequate funding should be provided to the ABC and SBS in recognition of their role in addressing the risk of under-provision of public interest journalism that generates broad benefits to society (recommendation 9)<br>▪ Targeted grants to support local journalism of about AU$50 million a year (recommendation 10)<br>▪ Introducing tax settings to encourage philanthropic funding of public interest journalism in Australia (recommendation 11)<br>▪ Education/training in digital literacy: |

| | |
|---|---|
| | – Establishing a government program to fund and certify non-government organisations for the delivery of digital media literacy resources and training (recommendation 12)<br>– The Terms of Reference for the review of the Australian Curriculum scheduled for 2020 should include consideration of the approach to digital media literacy education in Australian schools (recommendation 13)<br>▪ An independent regulator (eg ACMA) monitoring the digital platforms' efforts to identify reliable and trustworthy news (recommendation 14)<br>▪ Requiring the digital platforms to draft and implement an industry code for handling complaints about deliberately misleading and harmful news stories. The code should be registered with and enforced by an independent regulator, such as the ACMA (recommendation 15) |
| **Promoting competition** | ▪ Changes to Australia's merger laws to expressly require consideration of the effect of potential competition and to recognise the importance of data (recommendation 1)<br>▪ A new notification protocol for large digital platform that would alert the ACCC to proposed acquisitions that may impact competition in Australia (recommendation 2)<br>▪ A requirement for Google to allow Australian users of Android devices (new and existing) to choose their search engine and internet browser from a number of options, as proposed in Europe, rather than being provided with defaults (recommendation 3) |
| **Consumer protections** | ▪ The introduction of a prohibition on the use of unfair contract terms with civil pecuniary penalties for breach (recommendation 20)<br>▪ The introduction of a prohibition on 'certain unfair trading practices' (recommendation 21)<br>▪ The development of minimum internal dispute resolution standards by the ACMA to apply to digital platforms (recommendation 22)<br>▪ The establishment of an ombudsman scheme to assist with resolving disputes and complaints between consumers and digital platform providers. The ACCC recommends that the ACMA and the Telecommunications Industry Ombudsman (TIO) investigate the feasibility of the TIO taking on this role. If the ACMA and the TIO conclude that it is not feasible for the TIO to undertake this role, a standalone ombudsman should be created to resolve complaints about digital platforms (recommendation 23) |
| **Privacy Protections** | ▪ Strengthening protections in the Privacy Act for example by updating the definition of 'personal information' in the Privacy Act to clarify that it captures technical data and enabling the erasure of personal information (recommendation 16)<br>▪ Broader reform of Australian privacy regime to ensure it continues to effectively protect consumers' personal information in light of the increasing volume and scope of data collection in the digital economy (recommendation 17)<br>▪ The introduction of an enforceable privacy code of practice, developed by the Office of the Australian Information Commission (OAIC) specifically for digital platforms (recommendation 18)<br>▪ The introduction of a statutory tort for serious invasions of privacy (recommendation 19) |

**Government Response**

In a statement, Treasurer Josh Frydenberg said that the government 'accepts the ACCC's overriding conclusion that there is a need for reform — to better protect consumers, improve transparency, recognise power imbalances and ensure that substantial market power is not used to lessen competition in media and advertising services markets' and further that there is a need to 'develop a harmonised media regulatory framework'. Mr Frydenberg added that the government 'also accepts that there is a need to develop a harmonised media regulatory framework' (which appears to be an indication that the government accepts recommendation 6 of the report).

**Next steps?** Mr Frydenberg said that the precise form of the reforms and a detailed government response to the report recommendations will be informed by a 12 week public consultation process after which the government will finalise its response by the end of the year.

*[Sources: Treasurer Josh Frydenberg media release 26/07/2019; ACCC Digital Platforms Inquiry Final Report]*

**Data privacy as a human right?** The AFR reports that WiseTech CEO Richard White has suggested that the ACCC's report into digital platforms will result in data privacy being viewed as a 'fundamental human right'. 'Data sovereignty and data privacy, and the right to know if your own data is used for you, against you, or for some other purpose, is a human right… Companies that use your personal data should be telling you in great detail when they are using that your data, what they are using it for and when they ... try to monetise it some way that is not part of their original intent, they should tell you about the change, and they should do it "opt in", not "opt out"' Mr White is quoted as saying.

*[Source: [registration required] The AFR 29/07/2019]*

## Why not licence digital platforms? Trying to regulate digital platforms like Google and Facebook as if they were traditional publishers won't work, but why not licence them as we would a bank?

Writing in The Australian, Alan Kohler argues that attempting to regulate digital platforms like Google and Facebook as we would traditional publishers is unlikely to be effective, given they do not operate in that way. Rather, they operate much more like utilities.

On this basis he argues that they should be regulated as we would utilities or banks ie require them to be licensed. This approach would enable most of the ACCC's 23 recommendations to be incorporated into the licence conditions (as well as other requirements). It would also have the advantage of enabling Australia to act immediate and on its own as it could require that a digital organisations that want to operate a search engine or social media platform to have a licence to do so. 'It seems to me the only thing that would seriously make a difference to the digital platforms is a licensing regime, enforced by a tough regulator with the power and willingness to cancel licences' the article concludes. .

*[Source: [registration required] The Australian 30/07/2019]*

## Facebook will pay a $5bn fine to settle alleged privacy violations

The US Federal Trade Commission (FTC) has announced that Facebook Inc will pay a record-breaking $5 billion penalty and submit to new restrictions and a 'modified corporate structure' to settle charges that it violated a 2012 FTC order by 'deceiving users about their ability to control the privacy of their personal information'.

**Alleged Violations of 2012 Order**

- The FTC alleges that Facebook 'deceived it's users' by sharing the data of users' 'friends' with third-party app developers, even when those friends had set more restrictive privacy settings
- In addition, the FTC alleges that Facebook improperly policed app developers on its platform. The FTC contends that 'as a general practice', Facebook did not screen the developers or their apps before granting them access to user data instead relying on the developers agreeing to Facebook's policies and terms (which the FTC alleges Facebook did not enforce consistently)

- The FTC alleges that Facebook misrepresented users' ability to control the use of facial recognition technology with their accounts
- The FTC also alleges that Facebook violated the prohibition against deceptive practices when it told users it would collect their phone numbers to enable a security feature, but did not disclose that it also used those numbers for advertising purposes

**The new 20 year settlement order**

The FTC's new 20-year settlement order 'overhauls the way the company makes privacy decisions' by imposing a range of measures to increase transparency and accountability for decision making.

These measures include (among others):

- the establishment of an independent board level privacy committee to remove Facebook CEO Mark Zuckerberg's 'unfettered control' over decisions affecting user privacy
- a new requirement for Facebook to designate compliance officers to be responsible for Facebook's privacy program;
- a new requirement for the CEO and designated compliance officers to submit quarterly certifications to the FTC that the company is in compliance with the privacy program mandated by the order and an annual certification that the company is in overall compliance (with any false certification subject to individual and criminal penalties)
- an outside assessor to evaluate the effectiveness of Facebook's privacy program

**Significance of the settlement**

According to the FTC the $5 billion penalty is one of the largest penalties ever assessed by the US government for any violation and the largest ever imposed on any company for violating consumers' privacy ever imposed worldwide.

The settlement order also imposes new restrictions on Facebook's business operations including that Facebook: a) restructure its approach to privacy from the corporate board-level down; b) establish new mechanisms to ensure that Facebook executives are accountable for the decisions they make about privacy; and c) that the decisions made are subject to meaningful oversight.

**Department of Justice charges:** Following a year long investigation by the FTC, the Department of Justice (DoJ) will file a complaint on behalf of the FTC alleging that Facebook 'repeatedly used deceptive disclosures and settings to undermine users' privacy preferences in violation of its 2012 FTC order'. More particularly, it's alleged that Facebook shared users' personal information with third party apps that were downloaded by the users' 'friends' without many users being aware that Facebook was sharing the information. In addition, the FTC alleges that Facebook took inadequate steps to deal with apps that it knew were violating its platform policies.

**Separate action against Cambridge Analytica:** In a related, but separate development, the FTC also announced separate law enforcement actions against Cambridge Analytica, its former Chief Executive Officer Alexander Nix, and Aleksandr Kogan, an app developer who worked with the company. The FTC alleges that they used 'false and deceptive tactics to harvest personal information from millions of Facebook users'. According to the FTC both Mr Kogan and Mr Nix have agreed to a settlement with the FTC that will restrict how they conduct any business in the future.

**Facebook's response**: In a statement, announcing the settlement and outlining the changes being made as a result, Facebook CEO Mark Zuckerberg said that the changes bring Facebook's privacy controls 'more in line with our financial controls under the Sarbanes-Oxley legislation'.

He added that implementation of the changes, and more particularly documenting privacy controls/risks/mitigating actions would require substantial resourcing and flagged that 'it will take longer to build new products following this process going forward'.

Mr Zuckerberg went on to say that 'Overall, these changes go beyond anything required under US law today. The reason I support them is that I believe they will reduce the number of mistakes we make and help us deliver stronger privacy protections for everyone. As we build our privacy-focused vision for the future of social networking that I outlined earlier this year, it's critical we get this right. The next focus for our company is to build privacy protections as strong as the best services we provide. I'm committed to doing this well and delivering the best private social platform for our community'.

*[Source: FTC media release 24/07/2019; Facebook announcement 25/07/2019; [registration required] The WSJ 24/07/2019]*

**OAIC response**: In a statement, the Office of the Australian Information Commission (OAIC) said that the fine is 'a globally significant order that demonstrates the concerns of privacy regulators around the world' and 'reinforces the need for corporate entities to be transparent and accountable for the way they handle consumers' personal information'. OAIC went on to say that it is continuing its investigation into Facebook's handling of Australians' personal information, including engaging with international peer regulators.

OAIC also welcomed the government's announcement that it will give the OAIC new powers to regulate digital platforms. 'These increased penalties and a new binding code of privacy practice will ensure that digital platforms trading in personal information in Australia are held to the highest standards' OAIC said.

*[Source: OAIC media release 25/07/2019]*

**'Doomed to fail'?** Writing in The Conversation, Dean of Global Business, The Fletcher School, Tufts University Bhaskar Chakravorti cast doubt on whether the measures mandated by the settlement order, and more particularly on what he terms the 'centrepiece of the FTC deal' the appointment of a third party/outside assessor to oversee Facebook's handling of user data, will be effective. Professor Chakravorti contends that 'an independent assessor will lack the standards, regulatory and legal guidelines, and the insight needed to actually monitor how Facebook handles those three issues. This makes the privacy cop's job much harder than that of a regular cop or, say, a financial auditor'. As such, in his view 'the fine is a slap on the wrist, and the cop's arms are tied and don't reach far enough. This sets a very bad precedent: Both the FTC and Facebook can declare a victory of sorts, while the consumer loses'.

*[Source: The Conversation 29/07/2019]*

## The NAB announced on 26 July that it had commenced notifying the approximately 13,000 customers whose personal information may have been compromised as a result of a security breach

The NAB announced on 26 July that it had commenced notifying the approximately 13,000 customers whose personal information may have been compromised when their account 'set up was uploaded, without authorisation, to the services to two data service companies'.

### Details

- According to NAB's statement, the companies have said that the information was deleted within two hours of NAB's security teams contacting them.
- NAB Chief Data Officer, Glenda Crisp, said the compromised data included customer name, date of birth, contact details and in some cases, a government-issued identification number, such as a driver's licence number.
- Ms Crisp said that the issues was 'human error and in breach of NAB's data security policies'. Ms Crisp added that 'it was not a cyber-security issue. No NAB log-in details or passwords have been compromised – and NAB's systems remain secure'.
- NAB is advising impacted customers that they do not need to take any action with their account. 'Importantly there is no evidence to indicate that any of the information has been copied or further disclosed'.
- NAB is calling, emailing or writing to each impacted customer individually. A dedicated, specialist support team is in place, available to them 24/7. Also, if government identification documents need to be reissued, NAB has said that it will cover the cost as well as the cost of independent, enhanced fraud detection identification services for affected customers.

- NAB also confirmed that it has notified industry regulators, including the Office of the Australian Information Commissioner.

According to The AFR, approximately two thirds of customers impacted have been informed of the error by the bank with remaining customers expected to be notified over the next few days. Reportedly, NAB has said that the investigation into how the details were uploaded in error, is ongoing but declined to provide further details.

[Note: According to The Office of the Australian Information Commissioner (OAIC) malicious and criminal attacks were the main sources of data breaches in the notifiable data breach (NDB) scheme's first year of operation, representing 60% of all reported breaches. Overall, 35% of data breaches were attributed solely to human error. The most prominent human errors recorded were every day incidents such as personal information being sent to the wrong recipient, incidents of unauthorised disclosure, and where there is loss of paperwork or a data storage device. For a summary of the key takeaways from OAIC's report see: Insights one year on from Australia's Notifiable Data Breach scheme 20/05/2019; Governance News 15/04/2019]

*[Sources: NAB media release 26/07/2019; ITNews 26/07/2019; [registration required] The AFR 28/07/2019]*

## Climate Risk

### BHP has reportedly said it will spend $US400m to create a climate investment program to reduce emissions from its own operations as well as those generated from its resources

BHP CEO Andrew Mackenzie has given a speech outlining a number of measures the organisation will take to act on global warming including a US$400 million commitment to reduce Scope 1, 2 and 3 emissions though a new Climate Investment Program. Mr Mackenzie described the need to act as a 'strategic imperative for us to deliver long-term shareholder value'.

**Details**

- **In 2020 BHP will set public goals to address scope 3 emissions.** 'We will still push for efficient use of all our products as part of our overall decarbonisation strategy and plans. For that we must take a product stewardship role for all emissions across our value chain. And commit to work with the shippers, processors and users of our products to reduce scope 3 emissions. Those who enjoy the benefits of our products should be able to do so with less and less impact' Mr Mackenzie said.
- **BHP will continue to develop and invest in partnerships to drive action on the capture of carbon**
- **Over the next five years the program will scale-up low emissions** technologies that decarbonise our operations. The program is intended to 'drive investment in nature-based solutions and encourage further collective action on scope 3 emissions'.
- **Scenario analysis and disclosure:** Mr Mackenzie said that as a founding member of the Task Force on Climate Related Financial Disclosures, 'BHP believes that 'transparency is essential to inspire others' confidence in our progress with decarbonisation and to create awareness of all the trade-offs'. He said that BHP is committed to transparency on this basis.
- **BHP also aligns, and will continue to align executive remuneration to emissions performance.** 'From next financial year we will clarify and strengthen this link and further reinforce the strategic importance of action to reduce emissions' Mr Mackenzie said.

Mr Mackenzie concluded that the approach outlined, the '"all of the above" solution' is barely sufficient. 'All emitters, resource companies, customers, consumers must play their part together with governments to meet the climate challenge. This is what BHP stands for and I strongly urge others in our position to do the same' he said.

**Response to BHP's stance**

- The Australian reports that Minerals Council of Australia (MCA) Chair Helen Coonan said that it was 'unrealistic' to expect BHP's peers to follow BHP's example on scope three emissions, and that she regards it as a decision for individual organisations to make. Ms Coonan also reportedly said that 'it can be extremely counterproductive to require divestment in a vacuum where you have to transition to different levels of emissions. And expecting these things overnight is simply not the real world.'

- The AFR comments that BHP's stance is a 'landmark departure' from the 'traditional attitude' of Australian resource exporters to scope three emissions and from rival Rio Tinto, which has said it could not set targets for scope three emissions because the ultimate deployment of technologies to reduce emissions lies within the control of customers.
- Greens leader Adam Bandt issued a statement welcoming Mr Mackenzie's comments and expressing 'dismay that the head of one of the world's most polluting companies appears to be taking the climate emergency more seriously than the Liberal and Labor Parties'. Mr Bandt urged BHP to translate its commitments in to action and called on the Australian government to follow the UK, France, Canada and others by declaring a climate emergency.

*[Sources: Speech by BHP CEO Andrew Mackenzie Confronting Complexity: Evolving our approach to climate change 23/07/2019; The Guardian 23/07/2019; [registration required] The AFR 23/07/2019; 24/07/2019; 29/07/2019; [registration required] The Australian 29/07/2019; Adam Bandt media release 24/07/2019]*

### Suncorp will reportedly exit the thermal coal sector in response to a shareholder resolution

Climate action group, Market Forces has released a statement announcing that in response to a shareholder resolution (lodged by Market Forces on behalf of more than 100 shareholders), Suncorp has said that it will exit the thermal coal sector by 2025.

Suncorp said its insurance and investment portfolio exposure to fossil fuels was already at just 0.5% but that it was working toward a full exit. 'We do not directly invest in, finance or underwrite new thermal coal mining extraction projects, or new thermal coal electricity generation, and we will phase out of these exposures by 2025' a Suncorp spokesperson reportedly said.

*[Sources: Market Forces media release 26/07/2019; Insurance News 25/07/2019; Suncorp ASX Media release: Shareholder resolutions for consideration at AGM 26/07/2019; [registration required] The AFR 27/07/2019; [registration requried] The Australian 26/07/2019]*

## AML/CTF Risk

### Consultation on Bill seeking to introduce a $10,000 cash payment limit

**Overview | Consultation on Exposure Draft Legislation: Currency (Restrictions on the Use of Cash) Bill 2019**

Treasury is consulting on draft legislation proposing to implement an economy-wide cash payment limit of $10,000 for payments made or accepted by businesses for goods and services.

The proposal is in line with a Black Economy Taskforce recommendation aimed at addressing tax evasion and other criminal activities, the government announced it would introduce in the 2018-2019 federal budget.

**Some Key Points**

- The draft Bill proposes to introduce criminal offences for entities that make or accept cash payments of $10,000 or more. The maximum penalty is up to two years imprisonment and/or 120 penalty units ($25,200).
- Transactions equal to, or in excess of the $10,000 amount would need to be made using the electronic payment system or by cheque.
- Two of the offences apply if an entity makes or accepts a cash payment or series of payments, with strict liability applying to the circumstances of the payment including cash in equal to or exceeding the cash payment limit.
- The other two offences apply if the entity intended or was reckless about making or accepting such a payment or a series of payments.

- The draft explanatory material says that this is intended to ensure that entities cannot make large payments in cash so as to avoid creating records of the payment and facilitating their participation in the black economy and undertaking related illicit activities
- The draft legislation does not impose any additional reporting requirements
- The draft Bill also provides rules, similar to the rules that apply in the context of the taxation law, about the consequences that apply when the offence is committed by an entity that is not a legal person
- Proposed changes to threshold transaction reporting for AUSTRAC reporting entities: From 1 January 2021 its proposed that many AUSTRAC reporting entities will no longer need to report threshold transactions to AUSTRAC. Instead they will be subject to the cash payment limit like all other businesses in the economy.

**Proposed timeline:**

- The deadline for submissions on the draft legislation is 12 August
- It's proposed that the economy wide cash payment limit would be implemented from 1 January 2020. This means that offences apply to conduct occurring on or after that day. The proposed commencement date for certain AUSTRAC reporting entities is 1 January 2021

*[Sources: Treasury media release 26/07/2019; Draft explanatory memorandum; Exposure Draft Legislation: Currency (Restrictions on the Use of Cash) Bill 2019; Treasury FactSheet: At a glance summary of how the cash payment limit will work]*

## Other Developments

### Swinburne University has launched the inaugural quarterly Australian Leadership Index, a measure of community perceptions and expectations of leadership in the public, private, government and not-for-profit sectors

Swinburne University has launched the inaugural, Australian Leadership Index, a quarterly survey measuring public perceptions and expectations of leadership in the public, private, government and not-for-profit sectors.

According to Swinburne, the survey is the largest of its kind ever conducted. At this stage the report includes data from the last twelve months: Q3 2018 to Q2 2019.

**The ALI score**: ALI is a measure of the percentage of people who answered 'to an extremely large extent' or to a 'large extent' minus the percentage of people who answer 'not at all' or 'to some extent' when evaluating leadership for the public good

**Some Key Points**

**Perceived lack of leadership in government?** Over the period Q3 2018 to Q2 2019 perceptions of the Federal government's performance on a range of measures has not lived up to community expectations. For example, over the 12 month period, perceived performance with respect to delivery of social outcomes, economic outcomes, environmental outcomes, transparency, ethical standards, accountability, and balancing the needs of different groups (among other measures) was consistently below the expected standard. Perceived performance was also below expectations at local and state government levels. This is reflected in the overall ALI scores: The Federal government received an ALI score of -35 and both state and local governments received an ALI of -21.

By contrast, the health, education and justice sectors all rated more strongly.

Commenting on the findings, Dr Sam Wilson said that 'Perhaps the most dispiriting and striking finding is that the institutions that are supposed to be the custodians of the greater good – federal, state and local governments – are seen as showing no leadership in this space. By contrast, the institutions with which we have regular contact in the public sector – schools, hospitals and police services – are seen as showing much more leadership for the greater good'.

*[Sources: Swinburne media release 25/07/2019; Australian Leadership Index Portal]*

**United Kingdom | A new edition of the UK government's risk management principles for government departments (The Orange Book) has been released. It sets out the main principles underlying effective risk management in all government departments and arm's length public bodies with responsibility derived from central government for public funds.  The last time the document was updated was 2004**

*[Sources: The Orange Book Risk Management Principles 22/07/2019]*